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COMMENTS

THE EXCLUSIONARY EFFECT OF "MANSIONIZATION": AREA VARIANCES UNDERMINE EFFORTS TO ACHIEVE HOUSING AFFORDABILITY

Catherine Durkin[+]

Home ownership near the workplace has become unattainable[1] for many working Americans.[2] Despite the overall increase in national home-ownership rates,[3] according to the Urban Land Institute, "[a] rapid population rise and stagnating salaries for the middle class have made workforce housing a national problem."[4] "The Department of Housing and Urban Development [(HUD)] defines 'affordable housing' as a home which costs less than 30% of a family's income . . . ."[5] In 1999, one out of every nine households in the nation spent more than half its

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1. Childs Walker, *For Many in Middle Class, Home Isn't Where the Job Is*, BALT. SUN, Mar. 31, 2004, at 1A.

2. *See, e.g.*, Brigid Schulte, *For a Lucky Few, A Wooded Oasis*, WASH. POST, Feb. 6, 2003, § MS (Montgomery), at 14; *Squeezed Out*, ECONOMIST, July 22, 2000, at 33 (commenting on Bay Area nurses who went on strike "to demand wages that would allow them to live closer to where they worked, rather than enduring a commute of several hours" and noting that "[a] quarter of the positions in the Los Altos police force are empty because officers, unable to live near the town, have resigned, and the force expect[ed] to be down to half strength" within three months).

3. *The Roof That Costs Too Much*, ECONOMIST, Dec. 7, 2002, at 34 ("Two in three homes are owned by their occupants, and the lowest mortgage rates in three decades keep the numbers rising.").

4. Walker, *supra* note 1; *see also* John K. McIlwain, *Show Me the Money: A Proposed Federal Response to Urban Sprawl*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 26, 26 (2001); Carol A. Bell, *Workforce Housing: The New Economic Imperative?*, HOUSING FACTS & FINDINGS (Fannie Mae Found., Wash., D.C.), Vol.4, No.2, 2002, at 3-4, *available at* http://www.fanniemaefoundation.org/programs/hff/pdf/HFF_v4i2.pdf (examining the workforce housing problem briefly but thoroughly).

5. *The Roof That Costs Too Much*, *supra* note 3, at 34.

income on housing.[6] Since then, in Montgomery County, Maryland, which has been widely acknowledged for its efforts to address affordable housing concerns,[7] "[t]he average sale price for a home has increased by 54 percent in the past five years, while the income level rose only 14 percent."[8] Although a resident of Montgomery County, Maryland, must earn a minimum of $48,700 annually to afford the monthly payment on a median-cost home, twenty percent of Montgomery County residents earn $35,000 or less.[9] Since the mid-1990s, national house prices have increased by thirty percent, which is the biggest increase in house prices during a similar time period in history.[10] As a result, "'[f]irst-time home ownership opportunities are disappearing'"[11] and not just for the "familiar poor,"[12] but for families who are making at least fifty percent of

6. MILLENNIAL HOUS. COMM'N, MEETING OUR NATION'S HOUSING CHALLENGES: REPORT OF THE BIPARTISAN MILLENNIAL HOUSING COMMISSION 14 (2002); *see also Castles in Hot Air*, ECONOMIST, May 31, 2003, at 8, 9 (reporting that the average house price to median income ratio in the United States was then "at a record high" up by fourteen percent over the long-term average).

7. *See* Thomas A. Brown, *Democratizing the American Dream: The Role of a Regional Housing Legislature in the Production of Affordable Housing*, 37 U. MICH. J.L. REFORM 599, 632 (2004) ("Montgomery County, Maryland has enacted what may be the most successful program to create affordable housing in the country." (footnote omitted)); Peter W. Salsich, Jr., *Affordable Housing: Can NIMBYism Be Transformed Into OKIMBYism?*, *in* REPRESENTING THE POOR AND HOMELESS: INNOVATIONS IN ADVOCACY 89, 93 (Sidney D. Watson ed., 2001), *available at* http://www.abanet.org/homeless/RepresentingThePoorandHomeless.pdf ("The Montgomery County [Moderately Priced Development Unit] program is cited frequently as an example of what courageous and imaginative people can accomplish."); Jeff Barker, *Affluent Montgomery's Success Breeds a 'Dire' Housing Crunch*, BALT. SUN, Oct. 13, 2003, at 1A ("For years, Montgomery County had one of the nation's most progressive—and widely copied—affordable housing programs.").

8. Kelly Smith, *County Seeks Solutions to Affordable Housing Shortage*, MONTGOMERY J. (Rockville, Md.), Mar. 23, 2004, http://hocmc.org/AHC/2004journal article.htm. "[H]ouse prices have [also] been jumping ahead of incomes in most of America's big cities . . . . Eight of the 50 biggest metropolitan areas have seen prices rise by nearly a third in real terms" between 1997 and 2002. *The Roof That Costs Too Much*, *supra* note 3, at 34.

9. Barker, *supra* note 7.

10. *House of Cards*, ECONOMIST, May 31, 2003, at 3, 4.

11. Barker, *supra* note 7 (quoting Robert Goldman, President of Montgomery Housing Partnership, Inc.).

12. *The Roof That Costs Too Much*, *supra* note 3; *see also* McIlwain, *supra* note 4, at 30-32 (describing the national workforce housing crisis). The United States Department of Housing and Urban Development (HUD) has defined a family with a "critical housing need" as one who "spends more than 50 percent of its income on housing, or lives in a severely inadequate unit." *Id.* at 30. In 1997, over three million full-time workforce families who "do not fit the stereotype of families that cannot get decent, affordable housing" met these criteria. *Id.* By 1999, this number increased to 3.7 million. *Id.*

the national median income, who do not qualify for federal housing assistance.[13]

The traditional American attitude toward land use and planning has been a primary culprit in the present affordable housing shortage.[14] Historically, "we have always had large areas of undeveloped land. We have been able to use land until it is worn out, or no longer needed for its current use, and just move on."[15] However, the reality of our changed circumstances has forced people to pay more attention to sustainable growth strategies and local, as well as regional, community planning.[16] The shortage of affordable housing for moderate-income Americans has produced a number of negative results: it impedes a healthy economy,[17]

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13. McIlwain, *supra* note 4, at 30; *see also Castles in Hot Air*, *supra* note 6, at 10 ("[F]irst-time buyers are now finding it impossible to get on the bottom rung of the property ladder because they cannot scrape together the deposit.").

14. McIlwain, *supra* note 4, at 28. The author compares the American mindset:

> [M]any Americans consider land a free-market commodity in plentiful supply. They believe that a property owner's right to freely buy, sell, or develop land is sacred—no matter where the land is located, what its natural features are, or what impact its development might have on the environment, on other properties, or on the community at large. Citing constitutional law to back them up, landowners especially resist the idea of government deciding whose properties can and cannot be developed.

to that of the Germans:

> "No matter who owns it, Germans perceive land as a vital part of their collective patrimony and finite in supply. They also understand that the economic value of urban land is created in part by the public, not by property owners and developers, through the acts of planning, zoning and infrastructure investment. Accordingly, Germans believe that it is reasonable for them and their government to have a strong say in how land is treated."

Id. (quoting Roger Lewis, *Urban Planning: It's Time for a Foreign Concept To Hit Home in the US*, WASH. POST, June 28, 2001 at H3).

15. *Id.*

16. *See* David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 197 (1994) (noting a change in the concept of land "from a commodity only to both a resource and a commodity"); Tim Iglesias, *Housing Impact Assessments: Opening New Doors For State Housing Regulation While Localism Persists*, 82 OR. L. REV 433, 452 n.71 (2003) (explaining that the term "Quiet Revolution" refers to a general trend toward states reasserting their authority over local governments' exercise of power).

17. *See, e.g.*, MILLENNIAL HOUS. COMM'N, *supra* note 6, at 10; *The Sun Also Sets*, ECONOMIST, Sept. 11, 2004, at 67, 68 (warning that the overvaluation of home prices in the United States and the pricing-out of first time-buyers may lead to a stall or fall in the housing market, which could "trigger a sharp slowdown in consumer spending" and negatively impact the economy).

threatens the family unit,[18] strains local infrastructures,[19] burdens the environment,[20] and harms the quality of life.[21] Communities "need a mixture of people in order to function, including manual labourers, police, nurses and teachers" and therefore need a mixture of housing to accommodate them.[22]

Various state, federal, local, and private entities have responded to the growing shortage of affordable housing.[23] Such responses have been diverse in substance and procedure, but are insufficient to meet current needs.[24] The responses are insufficient because they focus exclusively on the large-scale development of new affordable housing, while ignoring the possibility of using area variances in built-up areas in ways that make workforce housing affordability increasingly unlikely.[25] The tendency to demolish existing affordable housing units in inner suburban areas and replace them with luxury-style housing, referred to in the press as "mansionization,"[26] is undermining the effectiveness of the various affordable housing responses discussed below.

This Comment addresses the potential impact of the area variance on housing affordability for the working class (workforce housing)[27] in the context of home ownership. Part I discusses the police power over making land-use regulations, and the circumstances under which that power is limited. It then documents the various ways courts, legislatures, and local governments have tried to prevent communities from making regulations that exclude certain socioeconomic classes from living there.

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18. *See, e.g.*, Melinda Westbrook, *Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 CONN. B.J. 169, 170 (1992) (explaining that adults are being priced out of the communities in which they grew up as children); Walker, *supra* note 1 (noting that families are often separated by counties and states as a result of high prices).

19. *See, e.g.*, Jim Patterson, *Gimmie Shelter from the Storm*, SANTA LUCIAN (Santa Lucia Chapter of the Sierra Club, San Luis Obispo, Cal.) July/Aug. 2004, at 1, 1, http://santalucia.sierraclub.org/lucian/santalucian_julyaug04.pdf.

20. *See, e.g., id.*

21. *See, e.g., id.*; *New Ranking Names America's Cough and Cold Capitals*, DRUG WEEK (NewsRx, Atlanta, Ga.), Nov. 5, 2004, 2004 WLNR 3210090 (reporting that the stress of long daily commutes in the car weakens the immune system, leaving people susceptible to illness).

22. *Squeezed Out*, *supra* note 2, at 33.

23. *See infra* Part I.B.2.

24. *See* discussion *infra* Parts IV.A-B.

25. *See* discussion *infra* Part IV.C.

26. *See, e.g.*, Annie Gowen, *Arlington Downsizing McMansion Aspirations*, WASH. POST, Feb. 17, 2004, at B1.

27. McIlwain, *supra* note 4, at 30 (defining workforce housing as private "housing that is affordable to moderate-income working families . . . making between 50 percent and 120 percent of median income"). Full discussions of low-income housing, public housing, and rental housing are beyond the scope of this Comment.

Part II identifies the extent of the federal government's role in facilitating affordable housing. Part III examines how local authorities can use their power to make exceptions to land-use regulations, particularly exceptions to size and height requirements, in ways that reduce the availability of affordable housing. Part IV analyzes the effectiveness of various legal responses to the workforce housing shortage. Part V proposes that such responses could have a more complete effect if they are applied to the procedure for granting area variances. This Comment concludes that this measure is necessary to stop the practice of mansionization, which undermines the various affordable housing efforts.

I. ZONING: THE HISTORY AND DEVELOPMENT OF ZONING

A. Traditional Euclidian Zoning

The Supreme Court first recognized the power of a government to control land use by zoning as part of the government's general, constitutionally-guaranteed police powers to regulate according to the health, safety, morals, or general welfare[28] in 1926 in *Village of Euclid v. Ambler Realty Co.*[29] In *Euclid*, the Supreme Court held that local governments have broad discretion over land-use decisions as long as they zone pursuant to their state's zoning enabling act, the means by which state legislatures confer zoning power on local governments,[30] and conform to constitutional principles.[31] Furthermore, *Euclid* established a presumption of validity in favor of the local government when plaintiffs

28. U.S. CONST. amend. X ("[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Supreme Court case law has always recognized the state police power, *see, e.g.*, Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 523-24 (1847); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 78-79 (1824), but courts have broadened the precise scope of the police power over time, *see, e.g.*, Santa Fe Cmty. Sch. v. N.M. State Bd. of Educ., 518 P.2d 272, 273 (N.M. 1974). Historically, states used the police power to promote their interests in the health, safety, and morals of their citizens, *see, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877); R.R. Co. v. Husen, 95 U.S. 465, 471 (1877); Miller v. Bd. of Pub. Works, 234 P. 381, 383 (Cal. 1925), but their use of the police power has grown to include their interest in general public welfare, *see, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952); Noble State Bank v. Haskell, 219 U.S. 104, 111 *amended by* 219 U.S. 575 (1911).

29. 272 U.S. 365 (1926).

30. *See* BLACK'S LAW DICTIONARY 1649-50 (8th ed. 2004).

31. *Euclid*, 272 U.S. at 389, 395-97 (explaining that the suburb in this case "is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit" within the limits of state, federal, and constitutional law, and concluding that separating types of land use from one another was a proper exercise of such power).

challenge its authority over land use through litigation.[32] The burden is thus on the challenger to establish that a zoning regulation is invalid.[33] In the affordable housing context, it is nearly impossible for challengers of zoning regulations to meet this burden.[34]

B. Zoning and Discrimination: "Exclusionary Zoning"

1. Scope of Supreme Court Jurisprudence on Housing Discrimination: When Do Zoning Regulations Become Improper Exercises of Police Power?

Supreme Court case law on housing discrimination has suggested that a local government's zoning decision to block new construction of workforce housing is within its legitimate police powers.[35] *Euclid* held that a local government's land-use decision is only an abuse of its police powers if it violates state law or the state constitution.[36] Later decisions have established that local land-use decisions must also comply with the United States Constitution.[37] For example, the Court applies a higher level of scrutiny when zoning ordinances infringe on another constitutionally guaranteed protection, such as substantive or procedural due process,[38] or equal protection.[39] However, the Supreme Court has held that there is no constitutional right, fundamental or otherwise, to

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32. *Id.* at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." (citing Radice v. New York, 264 U.S. 292, 294 (1924)); *see also* Westbrook, *supra* note 18, at 187 (discussing how the presumption of validity of local land-use decisions set forth in *Euclid* has undermined the promotion and construction of affordable housing).

33. *See Euclid*, 272 U.S. at 395.

34. *See, e.g.*, *id.* (applying rational basis scrutiny to determine whether the zoning ordinance was unconstitutional); Knight v. Tape, Inc., 935 F.2d 617, 627 (3d Cir. 1991) ("[T]he minimum rationality standard is an extremely difficult one . . . to meet.").

35. *Euclid*, 272 U.S. at 388 ("[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined . . . by considering it in connection with the circumstances and the locality."). In dicta, the *Euclid* Court suggested that protecting "favored localities" from added density was rationally a legitimate use of zoning power. *Id.* at 394-95; *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that maintaining "a quiet place where yards are wide, people few, and motor vehicles restricted" is a legitimate, permissible, police-power interest).

36. *Euclid*, 272 U.S. at 389.

37. *See infra* notes 38-46 and accompanying text.

38. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928).

39. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

affordable housing.[40] Although a zoning ordinance that infringes on a fundamental right is an unconstitutional violation of substantive due process,[41] a zoning ordinance that deprives citizens of affordable housing is not and would thus be upheld as a legitimate exercise of police power.[42] Moreover, the Supreme Court has held that economic status is not a "suspect" classification.[43] As such, although discriminatory intent to exclude a suspect class—for example, a racial minority—unconstitutionally violates equal protection,[44] a zoning ordinance that excludes based on economic status should withstand an equal protection analysis.[45] A zoning ordinance that excludes based on economic status is described as "exclusionary."[46]

Within these basic parameters, subtle distinctions between who a zoning ordinance excludes have triggered different constitutional tests

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40. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . .").

41. *Moore*, 431 U.S. at 499.

42. *Cf. id.* (explaining that a higher level of scrutiny was appropriate in *Moore* only because the contested ordinance infringed on "'one of the liberties protected by the Due Process Clause of the Fourteenth Amendment'"(quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974))).

43. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

44. *See Arlington Heights*, 429 U.S. at 265 (requiring proof that discrimination motivated the zoning decision as distinguished from a decision's merely discriminatory effect, and describing the kind of proof that would be sufficient to overturn the ordinance).

45. John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations that Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?*, 33 U. BALT. L. REV. 153, 186-87 (2004).

> For all practical purposes, an intent test, such as that in *Arlington Heights*, makes it virtually impossible to prove a violation of the Fourteenth Amendment because the local government can always cite a valid police power reason for its action. . . .
>
> Respected commentators have interpreted *Arlington Heights* as an "implicit endorsement of economic exclusionary zoning."

Id. (footnote omitted) (quoting DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 498 (3d ed. 1999)).

46. JAMES A. COON & SHELDON W. DAMSKY, ALL YOU EVER WANTED TO KNOW ABOUT ZONING . . . 193 (Patricia E. Salkin ed., 2d ed. 1993). The authors quote a helpful definition of exclusionary zoning: "'Exclusionary zoning may occur either because the municipality has limited the permissible uses within a community to exclude certain groups or has imposed restrictions so stringent that their practical effect is to prevent all but the wealthy from living there.'" *Id.* (citation omitted) (quoting Asian Ams. for Equal. v. Koch, 527 N.E.2d 265, 271 (N.Y. 1988)); *see also* Westbrook, *supra* note 18, at 173 (providing "large-lot zoning or restrictions on multi-family housing" as examples of exclusionary zoning practices).

and have produced different constitutional outcomes.[47] For example, the Supreme Court applied a strict-scrutiny analysis to overturn a zoning ordinance that affected the housing rights of a family,[48] and a rational-basis analysis to overturn a zoning ordinance that affected the housing rights of the mentally retarded.[49] In contrast, but yet consistent with *Euclid*,[50] the Court applied a rational-basis test to uphold a zoning ordinance that affected the housing rights of students sharing a dwelling.[51] A rational-basis test requires only that the ordinance be somehow reasonably related to the public welfare,[52] and allows communities to "use seemingly legitimate land use concerns as pretexts for denying [affordable housing] projects and then enter court on appeal with a presumption of validity in their favor."[53]

Although an equal protection challenge to a zoning ordinance requires proof of discriminatory intent,[54] under the Fair Housing Act (FHA),[55] "significant" discriminatory impact is often sufficient to invalidate a zoning ordinance in the absence of proof of discriminatory intent.[56] The FHA, however, "only applies to those individuals who are part of a protected class and does not cover those who are denied access to

47. *Compare* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974), *with* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

48. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (noting that "[w]hen a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate" because the freedom to make decisions about family life is considered a fundamental right).

49. *Cleburne*, 473 U.S. at 448 (holding that an ordinance requiring a special use permit for a group home for the mentally retarded failed rational basis scrutiny because it was applied to further irrational fears of a certain group, rather than a legitimate state interest, and insisting that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding are not permissible bases for treating a [group] home . . . differently"); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that closer scrutiny of a police-power regulation is required when it has a prejudicial effect on a suspect class).

50. *See supra* note 34 and accompanying text.

51. *Belle Terre*, 416 U.S. at 8-9 (lamenting that "every line drawn by a legislature leaves some out that might well have been included [but] [t]hat [is an] exercise of discretion . . . [which] is a legislative, not a judicial, function" (footnote omitted)).

52. *Id.* at 8.

53. Westbrook, *supra* note 18, at 187 (discussing how the deference articulated in *Euclid* has facilitated economic exclusionary zoning).

54. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

55. 42 U.S.C. §§ 3601-3619, 3631 (2000).

56. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250-51 (10th Cir. 1995); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988) (holding that zoning requirements are not "automatically" valid where they have "significant disparate effects").

housing based solely upon their economic status."[57] Accordingly, under the FHA, a court will only overturn a zoning ordinance that excludes based on economic status if it is coupled with a discriminatory impact on one of the protected classes—for example, a racial minority.[58]

2. Inclusionary/"Fair-Share" Approaches

Even without a Supreme Court mandate, state legislatures, state courts, local governments, and private citizens have addressed the problem of exclusionary zoning on their own.[59] The various methods by which they have done so—"inclusionary" methods—"[attempt] to create more balance in the private housing market by ensuring a better mix of housing types and price ranges."[60]

(a) Judicial Initiatives and the Fair-Share Doctrine

Although the Supreme Court has not declared that economic exclusionary zoning is unconstitutional,[61] some state courts have interpreted economic exclusionary zoning as a violation of their state constitutions' equal protection and general welfare clauses.[62] Where a zoning decision goes too far in pursuit of other interests—such as elevating property values—at the expense of affordable housing, some state courts have required that municipalities adhere to the fair-share doctrine, which requires them to make zoning regulations that accommodate economically diverse housing needs.[63]

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57. Delaney, *supra* note 45, at 200. The classes protected by the FHA are "race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604(d).

58. *See* Westbrook, *supra* note 18, at 174 & n.32.

59. *See infra* Parts I.B.2.a–d.

60. ERIC DAMIAN KELLY & BARBARA BECKER, COMMUNITY PLANNING 377 (2000).

61. *See supra* notes 40, 43 and accompanying text.

62. Delaney, *supra* note 45, at 192.

63. *See, e.g.*, Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530, 546 (Conn. 1988); Britton v. Town of Chester, 595 A.2d 492, 495 (N.H. 1991); S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 421-22 (N.J. 1983); S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 731 (N.J. 1975), *rev'd*, 456 A.2d 390 (N.J. 1983); *cf.* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (hinting that its deferential approach may not apply to "cases where the general public interest would so far outweigh the interest of the municipality"). *See generally* John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 44 (1987) (critiquing the *Mount Laurel I* and *Mount Laurel II* decisions, exposing the core dilemma of the fair-share approach by explaining that "[o]n the one hand, it is clear that little consideration of lower-income land use concerns will occur without judicial intervention[, but] [o]n the other hand, affirmative judicial intervention in the land use control process has seemed to violate the limits of judicial legitimacy," and suggesting ways the doctrine can be reformed into a more workable policy to promote affordable housing). Many state zoning enabling acts and

Southern Burlington NAACP v. Township of Mount Laurel (*Mount Laurel I*)[64] is the most notorious example of a court imposing the fair-share doctrine on its local government.[65] The issue in *Mount Laurel I* was whether the exclusionary zoning practice of prohibiting the development of multi-family housing was justified as being "in the best present and future fiscal interest of the municipality and its inhabitants."[66] The New Jersey Supreme Court held that the municipality's zoning ordinance violated the state's constitution because it prevented a realistic opportunity for its fair share of the region's low to moderate income citizens to afford housing.[67] Its rationale was that a "zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare,"[68] meaning the general welfare of the entire state.[69] Because the state confers its police power to zone on a local government, a local government must use it to benefit "the welfare of the citizens beyond the borders of the particular municipality."[70] *Mount Laurel I* departed from *Euclid* by imposing an affirmative duty on local governments to provide access to housing for all socioeconomic classes rather than permitting them to make purely fiscal zoning decisions at the expense of their citizens' access to affordable housing.[71]

The *Mount Laurel I* holding proved difficult to apply in practice, and sparked "debates over [the meaning of] a 'developing community,' . . . 'realistic opportunity' for affordable housing, and . . . a 'community's fair share.'"[72] After eight years, during which time the state made little progress in changing its exclusionary practices,[73] the New Jersey

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local municipalities' zoning ordinances have incorporated the fair-share doctrine as part of their comprehensive plans for managing growth. *See, e.g.*, MONTGOMERY COUNTY, MD., CODE §§ 25A-2(5), -5(b)(1) (2004), http://www.amlegal.com/library/md/montgomeryco.shtml (follow "Frames" hyperlink; then follow "Part II. Local Laws, Ordinances, Resolutions, Etc." hyperlink; then follow "Chapter 25A. Housing, Moderately Priced" hyperlink) (requiring all subdivisions of twenty or more units to include a minimum number of moderately priced units in various sizes).

64. 336 A.2d 713 (N.J. 1975), *rev'd*, 456 A.2d 390 (N.J. 1983).

65. *See* Delaney, *supra* note 45, at 190.

66. *Mount Laurel I*, 336 A.2d at 718; *see also* Delaney, *supra* note 45, at 191.

67. *Mount Laurel I*, 336 A.2d at 728.

68. *Id.* at 725; *see also* Delaney, *supra* note 45, at 193.

69. *Mount Laurel I*, 336 A.2d at 727-28.

70. *Id.* at 726.

71. Brown, *supra* note 7, at 608; Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 115 (1997); Delaney, *supra* note 45, at 192; Payne, *supra* note 63, at 20-21.

72. Delaney, *supra* note 45, at 195.

73. *See Mount Laurel II*, 456 A.2d 390, 417-18 (N.J. 1983) (admonishing that because of the legislature's failure to act, the court "must give meaning to the constitutional doctrine in the cases before us through [its] own devices, even if they are relatively less suitable"); Delaney, *supra* note 45, at 195; Payne, *supra* note 63, at 33.

Supreme Court prescribed specific ways for the state to implement the fair-share doctrine in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*.[74]

Other state courts, such as Virginia,[75] New York,[76] Pennsylvania,[77] West Virginia,[78] and New Hampshire,[79] have invalidated economic exclusionary zoning in an attempt to eradicate what has become known as "Not In My Backyard" (NIMBY) syndrome.[80] NIMBY specifically refers to "the attitude of persons blessed with affordable housing and their political representatives" toward change, and their tendency to thwart "efforts to locate multifamily forms of affordable housing in residential neighborhoods."[81]

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74. 456 A.2d at 415 n.5, 416 (lamenting that "[z]oning ordinances that either encourage [economic, racial, and other forms of segregation] or ratify its results are not promoting our general welfare, they are destroying it"); *see also* Iglesias, *supra* note 16, at 456 (pointing out that the *Mount Laurel* approach has led to significant debate about the power struggle between local governments and the states and to what extent a state can intrude on local decision making).

75. *See, e.g.*, Bd. of County Supervisors v. Carper, 107 S.E.2d 390, 396-97 (Va. 1959) (holding that maintaining a concentration of small lots in one portion of the county was an unconstitutional use of the police power because it furthered private rather than public interests).

76. *See, e.g.*, Berenson v. Town of New Castle, 341 N.E.2d 236, 242 (N.Y. 1975) (requiring local zoning municipalities to consider the general welfare of residents in surrounding communities).

77. *See, e.g.*, Surrick v. Zoning Hearing Bd., 382 A.2d 105, 111-12 (Pa. 1977) (invalidating, based on the fair-share doctrine, a zoning ordinance that placed a limitation on multi-family residential uses).

78. *See, e.g.*, Kaufman v. Planning & Zoning Comm'n, 298 S.E.2d 148, 157-58 (W. Va. 1982). The court disagreed with and overruled a local zoning commission's view that "[p]roperty depreciation and the [economic class] of renters are proper considerations . . . because they relate to the 'harmonious development of the municipality,'" *id.* at 154 (quoting W. VA. CODE § 8-24-30(4) (1976)), as provided by the state's zoning enabling law. The court's rationale was that "[t]he economic status of prospective inhabitants who will occupy the proposed subdivision is no more a legitimate consideration than would be the occupants' sex, race, creed, color, or national origin." *Id.* at 158. The court also held that "attempting to use the planning commission as a vehicle to 'plan' out persons of low income" was impermissible exclusionary zoning. *Id.* at 157.

79. *See, e.g.*, Britton v. Town of Chester, 595 A.2d 492, 494-96 (N.H. 1991) (finding that "[m]unicipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated [because they are] subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries," and clarifying that the general welfare provision of the New Hampshire Constitution includes the "welfare of the 'community'").

80. *See* Salsich, *supra* note 7, at 89.

81. *Id.* The NIMBY affliction has been blamed for other social problems besides the present shortage of affordable housing, for example, urban sprawl, extensive commuting, and environmental damage, *id.* at 92, and racial segregation, *see* Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 497-99, 520 (1994); *see also*, Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288,

(b) State Regulatory Initiatives

State legislatures have also taken steps to limit the discretion municipalities have over zoning decisions.[82] Some states have sought to promote inclusionary practices by enacting legislation that generally falls into two categories: "appeals statutes" (also known as "override statutes")[83] and comprehensive or centralized planning statutes.[84]

The first type of inclusionary state legislation, the state override or appeals statute, provides developers of affordable housing who meet certain criteria with a procedural remedy when local zoning authorities deny their proposals for constructing new affordable housing.[85] Appeals statutes allow the state to administratively review and overturn local zoning decisions and permit-grants, thereby reducing the local government's discretion over land use.[86] Their purpose is to ensure that developers will have the opportunity to build new affordable housing.[87]

The second type of state legislation, the comprehensive or centralized planning statute, requires that local zoning ordinances conform to a comprehensive plan established by the state.[88] These statutes are proactive efforts by the state to force local governments to address

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288 (1992); Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78, 79 (2002) (suggesting that NIMBY, "the most important barrier to the development of affordable housing after insufficient subsidy. . . . will never be 'overcome'" and proposing alternative strategies to manage it in order to achieve affordable housing goals (footnotes omitted)).

82. *See* Callies, *supra* note 16, at 197-98 (describing a "shift in governmental regulation of land use from local governments back to the states" and attributing it to the "relative lack of planning at the local level, together with a disregard of the regional and statewide implications of such unplanned local land-use decision making").

83. *See* Brown, *supra* note 7, at 601; Edward G. Goetz et al., *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 34 (2004). Override statutes are also known as "builders' remedies." *Id.* at 35.

84. *See* Brown, *supra* note 7, at 603; Goetz et al., *supra* note 83, at 38.

85. *See* Brown, *supra* note 7, at 612-13.

86. *See id.* at 613.

87. *See, e.g.*, CONN. GEN. STAT. ANN. § 8-30g (West 2001 & Supp. 2005); MASS. GEN. LAWS ANN. ch. 40B, §§ 21-23 (West 2004); R.I. GEN. LAWS §§ 45-53-2, -53-4, -53-5 (1999 & Supp. 2004); *see also* Brown, *supra* note 7, at 615; Goetz et al., *supra* note 83, at 35-36 (highlighting that this approach's success assumes developers have the initiative to provide affordable housing); Westbrook, *supra* note 18, at 176 (arguing that the success of such a statute in Connecticut depends on the court rejecting the highly deferential *Euclid* approach in reviewing land-use decisions).

88. *See, e.g.*, CAL. GOV'T CODE § 65300 (West 1997); FLA. STAT. ANN. §§ 163.3161, .3194 (West 2000 & Supp. 2005); OR. REV. STAT. § 197.010 (2003); WASH. REV. CODE §§ 36.70A.010, 70A.040, 70A.070 (2003).

affordable housing issues in advance.[89] Their purpose is to anticipate solutions based on projections for future housing needs, supply, population growth, and availability of land.[90] They usually insist only that local housing decisions are "consistent" with the state's plan, without establishing specific guidelines for what constitutes "consistent."[91]

(c) Local Initiatives

Some local governments have implemented inclusionary policies absent a judicial or legislative mandate.[92] One of the first and most well known examples is the Montgomery County, Maryland Moderately Priced Dwelling Unit ordinance (MPDU).[93] The ordinance represents a compromise between developers and advocates for affordable housing.[94] For all new developments of twenty or more units, the MPDU requires a developer to set aside a minimum percentage of affordable housing options of various sizes.[95] In exchange, the developers are allowed to build beyond the density normally allowed in that zone by up to twenty-two percent.[96] Alternatively, developers can avoid the minimum-percentage requirement in one of the following ways: either by paying into a County Housing Initiative Fund,[97] or by developing a high rise residential building and offering to build more affordable housing nearby.[98]

A Montgomery County property developer may only exercise the first option if an Alternative Review Committee makes two findings.[99] First,

89. *See* Brown, *supra* note 7, at 624 (commenting that New Jersey's Fair Housing Act, an example of this proactive model, "aims to [reduce the occurrence of] adversarial proceedings").

90. *See* Goetz et al., *supra* note 83, at 38-39 (criticizing this approach's failure to provide "a programmatic means of implementation and . . . effective compliance powers").

91. Iglesias, *supra* note 16, at 454 (noting that the effectiveness of the "consistency findings" in comprehensive planning statutes have been often criticized).

92. *See, e.g.*, MONTGOMERY COUNTY, MD., CODE § 25A (2004), http://www.amlegal.com/library/md/montgomeryco.shtml (follow "Frames" hyperlink; then follow "Part II. Local Laws, Ordinances, Resolutions, Etc." hyperlink; then follow "Chapter 25A. Housing, Moderately Priced" hyperlink).

93. *See id.*; Calavita et al., *supra* note 71, at 111 ("[The] Montgomery County . . . Moderately Priced Dwelling Unit program . . . is arguably the largest [inclusionary housing] program of any single local government jurisdiction, resulting in the production of some 10,000 affordable housing units over a period of nearly 25 years."); Salsich, *supra* note 7, at 93 ("The Montgomery County [affordable housing] program is cited frequently as an example of what courageous and imaginative people can accomplish.").

94. *See* MONTGOMERY COUNTY, MD., CODE §§ 25A-1, 25B-1.

95. *Id.* § 25A-5(a) to (b).

96. *Id.* § 25A-5(c).

97. *Id.* §§ 25A-5(e)(1), 25A-5A.

98. *Id.* §§ 25A-5(e)(2), 25A-5B.

99. *Id.* § 25A-5A(a).

the Committee must find either that the nature of the proposed development would render the moderately priced dwelling units "effectively unaffordable,"[100] because of a financially prohibitive "indivisible package of resident services and facilities" for the would-be inhabitants of the units,[101] or that environmental constraints would render the units "economically infeasible."[102] Second, the Committee must find that the alternative would benefit the public more than including the affordable units within the proposed development.[103] A Montgomery County property developer may only exercise the second option if the director of the County Department of Housing and Community Affairs makes two findings.[104] First, the director must find that the alternative would benefit the public more than including the affordable units within the proposed development.[105] Second, the director must find that the alternative will "further the objective of providing a broad range of housing opportunities."[106] The payment and land options are thus disfavored by the ordinance.[107]

The housing trust fund (HTF) is another local initiative intended to ease the affordable housing problem.[108] An HTF is a community-administered fund that has a specifically identified source and a named purpose or beneficiary.[109] Sources of revenue for the trust funds vary

100. *Id.* § 25A-5A(a)(1)(A).

101. *Id.*

102. *Id.* § 25A-5A(a)(1)(B).

103. *Id.* § 25A-5A(a)(2).

104. *Id.* § 25A-5B(a).

105. *Id.* § 25A-5B(a)(1).

106. *Id.* § 25-5B(a)(2).

107. *See* Salsich, *supra* note 7, at 93 ("[T]he contribution of land or cash alternatives may not be approved if the developer 'can feasibly build significantly more [affordable housing] at another site.'" (quoting MONTGOMERY COUNTY, MD., CODE § 25A)). This preference for actual construction of affordable units also appears in New Jersey case law. *See* Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill, 802 A.2d 512, 526-27 (N.J. 2002) (disagreeing with the administrative agency charged with implementing the fair-share doctrine enunciated in *Mount Laurel* on whether a project is considered to be inclusionary when the developer pays a fee in lieu of constructing affordable housing, and holding that where a developer chooses this alternative rather than actually constructing affordable housing, it is not entitled to the same cost benefits offered by law to inclusionary developers).

108. *See* Mary E. Brooks, *Housing Trust Funds: Seeking Security in Housing Finance*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 55, 55-62 (1995).

109. *See id.* at 55-56 (listing real estate transfer taxes and exaction fees collected from developers as examples of the sources for such HTFs and pointing out that the purpose of such funds is specific to the needs of the community); Iglesias, *supra* note 16, at 449-50 & 499 n.64 (arguing that the local policy of requiring commercial developers to pay a housing impact fee, based on the expected housing demands their proposed development will have, is an example of the positive role local governments can have in promoting affordable housing).

among jurisdictions,[110] but two common sources are real estate transfer taxes[111] and impact fees for nonresidential development, which are fees imposed "to offset the impact of their development on the housing market."[112] These funds are used to promote a variety of housing goals such as "new construction, rehabilitation, weatherization, housing-related services, rental assistance, [and] foreclosure prevention."[113] State governments are increasingly attracted to the HTF approach and, as of the spring of 2004, as many as thirty-four states had adopted it as part of their solution to the affordable housing shortage.[114] The federal government has also considered, but not yet implemented, the HTF approach.[115]

Despite all of these state and local initiatives to eradicate exclusionary zoning practices associated with NIMBY, some land-use professionals and developers have acknowledged that local opposition to the development of new affordable housing will always frustrate inclusionary goals.[116] From their perspective, the most effective way to deal with

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110. Beth Parr, Note, *Almost Home: Policy and Politics in the Campaign for a National Housing Trust Fund*, 11 GEO. J. ON POVERTY L. & POL'Y 321, 329 (2004).

111. *Id.*; *see also* Brooks, *supra* note 108, at 55.

112. MARY E. BROOKS, CTR. FOR CMTY. CHANGE, HOUSING TRUST FUND PROGRESS REPORT 2002: LOCAL RESPONSES TO AMERICA'S HOUSING NEEDS 2 (2002).

113. Brooks, *supra* note 108, at 57-58.

114. *See* Kristin Larsen, *Florida's Housing Trust Funds—Addressing the State's Affordable Housing Needs*, 19 J. LAND USE & ENVTL. L. 525, 529 (2004) (noting that the number of states that established an HTF increased by thirty-five percent over ten years).

115. Parr, *supra* note 110, at 331-32. Similar to local HTFs that have been implemented in some communities, the proposed Federal Housing Trust Fund (FHTF) would generate funds from specific sources and allocate them to qualifying jurisdictions to assist with housing affordability problems. *See* Federal Housing Trust Fund Act of 1994, H.R. 5275, 103d Cong. §§ 101(a), 103(a) (1994) (identifying the sources for the proposed fund as reduced homeowner tax deductions for high-income taxpayers and reduced property tax deductions from high-income taxpayers). Its passage would result in a thirty billion dollar commitment to provide low-income families with access to affordable housing. Parr, *supra* note 110, at 321. However, workforce families seeking home-ownership would not benefit from this proposal because their income level would preclude them from qualifying for the assistance. *See id.* at 331. A majority of the fund would assist extremely low-income and very low-income families, *id.* at 331, which are defined as earning no more than fifty percent of the median income, *id.* at 324, whereas workforce families earn at least fifty percent of the median income, McIlwain, *supra* note 4, at 30. Thus, the fund would primarily facilitate affordable rental housing. Parr, *supra* note 110, at 331.

116. *See, e.g.*, Iglesias, *supra* note 81, at 79 ("[L]ocal opposition will never be 'overcome' so a more reasonable framing from the developer's perspective is 'managing' local opposition."). *But see* John McIlwain, *Density Is a Seven-Letter Word*, MULTIFAMILY TRENDS, Fall 2003, at 8, 8 (arguing that the NIMBY attitude is partly a result of "[l]arge public housing projects [that destroyed] many decent neighborhoods in the 1950s and 1960s," but that today "most new multifamily developments consist of 100

NIMBY is to anticipate local opposition to affordable housing and proactively design strategies to overcome it.[117] This approach has been referred to by one commentator as "managing local opposition" (MLO).[118] It incorporates "legal strategies, community organizing, and public relations strategies."[119] Marketing the new development as "workforce housing" rather than "low-income housing,"[120] recruiting a base of community supporters to reach out to concerned neighbors,[121] holding community meetings to dispel misinformation,[122] researching the local law and drafting a demand letter to compel the approval of the proposed development,[123] and seeking favorable media coverage for the proposed development[124] are examples of successful ways to implement the MLO approach. This approach facilitates the construction of affordable housing, yet respects local communities by working with them in order to avoid litigation.[125]

(d) Miscellaneous Small-Scale Initiatives

The nation's collective response to the workforce housing shortage has included various small-scale efforts.[126] Because there are presently not enough of these, their overall effect is limited.[127] They often require philanthropic or special-interest, rather than purely economic, incentive.[128] An interesting example of such an initiative is Brindledorf, a

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to 200 units, are carefully designed and sited, and have modest to luxurious amenities" and normally "increase property values" in the surrounding area).

117. *See* Iglesias, *supra* note 81, at 79-80 (discussing the success of the Managing Local Opposition (MLO) approach in obtaining local government approval of proposals to develop affordable housing in northern California).

118. *Id.* at 79.

119. *Id.*

120. *Id.* at 88.

121. *Id.*

122. *Id.* at 89-90.

123. *Id.* at 94.

124. *Id.* at 96.

125. *See id.* at 79-80.

126. *See* Michael Bodaken, *The Increasing Shortage of Affordable Rental Housing in America: Action Items for Preservation*, HOUSING FACTS & FINDINGS (Fannie Mae Found., Wash., D.C.) Vol.4, No.4, 2002, at 5-7, *available at* http://www.fanniemae foundation.org/programs/hff/pdf/HFF_v4i4.pdf ("New, nonspeculative owners are beginning to develop preservation ownership businesses.").

127. *See id.* at 7.

128. *See id.* at 6. The author makes the following argument regarding these private investments:

> Strong, business-minded/socially motivated, preservation entities (either nonprofit or for profit, but always nonspeculative) are essential to the preservation and improvement of affordable housing. Indeed, any business model for sustainability *requires* the presence of such entities. Put another way,

moderately-priced cooperative living community in Silver Spring, Maryland.[129] The creators of this community describe themselves as real estate investors who have a genuine desire to "serve the community,"[130] and are committed to "'[d]o the right thing and care about people'"[131] by simply "providing nice places where people can live."[132] They refurbished an 1880s farmhouse on six acres of land to house teachers who are priced out of most other decent housing that is near where they work.[133]

II. THE FEDERAL RESPONSE TO THE AFFORDABLE HOUSING PROBLEM

The federal government is involved in housing in three main ways: first, the federal government's tax policy is crafted so as to encourage home ownership;[134] second, its influence over housing finance has facilitated home ownership, especially in the suburbs;[135] and third, the federal government helps low income groups obtain housing.[136]

The tax incentive is the most indirect but also the most influential way the federal government is involved in housing issues.[137] The federal government's tax policy encourages home ownership by providing

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> we can't save affordable housing unless there are capable stewards willing to take on this important responsibility.
>
> A core national policy objective should be the assembly of a new group of interested, vigorous owners willing to invest new resources into this housing. Below-market investments and grants are needed to sustain these new entities.

Id.

129. *See* Schulte, *supra* note 2; Karen Ceraso, *Eyesore to Community Asset*, SHELTERFORCE (Nat'l Hous. Inst., Montclair, N.J.) July/Aug. 1999, http://www.nhi.org/online/issues/106/ceraso.html (describing how goals other than economic profit, such as historic preservation, have furthered affordable housing).

130. Schulte, *supra* note 2.

131. *Id.* (quoting Sue Eynon Lark, co-owner of the Brindledorf cooperative living community).

132. Brindledorf Homepage, http://www.brindledorf.com (last visited Dec. 16, 2005).

133. Schulte, *supra* note 2; *see also* David Listokin & Barbara Listokin, *Historic Preservation and Affordable Housing: Leveraging Old Resources for New Opportunities*, HOUSING FACTS & FINDINGS (Fannie Mae Found., Wash., D.C.), Vol.3, No.2, 2001, http://www.fanniemaefoundation.org/programs/hff/v3i2-histpres.shtml (describing the trend of restoring older buildings to further the goals of both historic preservation and affordable housing); *cf. Homing in on the Risks*, ECONOMIST, June 5, 2004 at 12-13 (describing the general phenomenon that "surging house values have priced out first-time buyers").

134. KELLY & BECKER, *supra* note 60, at 381.

135. *Id.* at 378.

136. *Id.*

137. *See id.* at 381; McIlwain, *supra* note 4, at 26, 32 (arguing that the federal government should exercise this influence in other ways to promote affordable housing and development strategies).

significant tax benefits to those that own a home.[138] The tax policy does not provide all socioeconomic groups with access to the financial advantage of home ownership and does nothing to promote affordable housing.[139]

The second way the federal government is involved in housing issues is primarily historical. Through the Federal Housing Administration and the Veterans Administration programs, the federal government made mortgage funding more accessible to more people by reducing the percentage required for a down payment.[140] Today, these programs have largely been replaced by private mortgage companies, but their influence over the basic structure of housing finance has persisted.[141] However, because house prices are rising at a faster rate than salaries, first-time buyers and workforce families are unable to meet monthly payments on homes, which nullifies the fact that down payment requirements are lower than they were before the federal government became involved in housing finance.[142]

The federal government's third role in housing has been to provide low-income housing.[143] It has done so in various ways, beginning with the Housing Act of 1937,[144] which provided funding for public housing.[145] Recently, federal housing and community development programs, which

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138. *See Home Sweet Home*, ECONOMIST, Oct. 18, 2003, at 13, 13-14 ("In America, only a fool . . . or somebody too rich to care would refuse the handouts that the government lavishes on home-owners.").

139. *Cf. id.* (acknowledging the advantage of this policy, that "home owners (with a stake in their communities) are better and happier citizens," as well as the disadvantage, that it "reward[s] the rich more generously than the moderately prosperous, and . . . the poor—who cannot aspire to buy property, even on heavily subsidised terms—not at all").

140. *See* KELLY & BECKER, *supra* note 60, at 379 (crediting these programs for "making home ownership the norm within the United States"). These federal programs provided mortgage insurance and guaranteed low-interest, long-term mortgages with low down payments. *Id.*

141. *See id.* The Federal National Mortgage Association (Fannie Mae) adopted the Federal Housing Administration standards for which homes qualify for mortgage insurance. *Id.* Fannie Mae is a "mortgage pool . . . that is the largest buyer of home mortgages in the United States." *Id.* Other ways the federal government is currently involved in housing finance are through the Government National Mortgage Association, which also "buys mortgages backed by the [Federal Housing Administration] and [Veterans Administration]," *id.* at 380, and the Farmers Home Administration, which provides loans for housing and community development in rural areas, *id.*

142. *See* ZHONG YI TONG, FANNIE MAE FOUND., HOMEOWNERSHIP AFFORDABILITY IN URBAN AMERICA: PAST AND FUTURE 5 (2004).

143. KELLY & BECKER, *supra* note 60, at 378.

144. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437).

145. KELLY & BECKER, *supra* note 60, at 380.

are now administered by HUD,[146] generally embody four different strategies: providing private sector incentives for development of low-income rental housing, distributing block grants, revitalizing "severely distressed" public housing, and mortgaging and insuring low-income rental housing.[147] Lately, HUD's goal has been to "consolidate[] and privatize[] many of its programs while placing more responsibility on state and local governments."[148] Accordingly, it still administers programs, which have been underfunded because of periodic efforts to curb federal social spending,[149] but does not play a significant role in the affordable housing effort for workforce and moderate-income families.[150] In 1999, the federal government established the bipartisan Millennial Housing Commission (MHC) to investigate the extent of the housing problem.[151] The MHC issued a report in May 2002[152] that suggested various ways to deal with current challenges,[153] but the federal government has yet to adopt any of its suggestions.[154] Meanwhile, its

146. MILLENNIAL HOUS. COMM'N, *supra* note 6, at 23. HUD was created in 1965. *Id.*

147. *Id.* at 23-24; *see also* U.S. DEP'T OF HOUS. & URBAN DEV., PROGRAMS OF HUD 8-108 (2005), *available at* http://www.huduser.org/whatsnew/ProgramsHUD05.pdf (describing HUD's various programs). These programs, though important, do little to promote affordable housing for the middle class, and are thus beyond the scope of this Comment.

148. KELLY & BECKER, *supra* note 60, at 381.

149. *Id.* at 380-81.

150. *See, e.g.*, U.S. Department of Housing and Urban Development, HOME Investment Partnerships Program, Description of Eligible Customers, http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm (last updated Dec. 8, 2005). States and localities must meet the HOME program's eligibility requirement to receive funding:

> For rental housing and rental assistance, at least 90 percent of benefiting families must have incomes that are no more than 60 percent of the HUD-adjusted median family income for the area. In rental projects with five or more assisted units, at least 20% of the units must be occupied by families with incomes that do not exceed 50% of the HUD-adjusted median. The incomes of households receiving HUD assistance must not exceed 80 percent of the area median.

Id.

151. Act of Oct. 20, 1999, Pub. L. No. 106-74, § 206(a)-(c), 113 Stat. 1047, 1070 (codified as amended at 42 U.S.C. § 12701 note (2000) (Millennial Housing Commission)). Its tasks were to examine the importance of housing, the possibilities for providing affordable housing by using the private sector, and the effectiveness of HUD programs.

152. *See* MILLENNIAL HOUS. COMM'N, *supra* note 6. The report stated that affordable housing "is the single greatest housing challenge facing the nation." *Id.* at 14.

153. *See id.* at 29-42, 43-70, 71-83 (suggesting several new strategies, as well as improvements to strategies already in place, and listed a series of supporting recommendations based on its findings).

154. *See* John K. McIlwain, *Doing More for Affordable Housing*, MULTIFAMILY TRENDS, Summer 2003, at 8, 8. The MHC report

> was the product of a year's work by some of the country's best housing minds, backed by excellent staff and millions of taxpayer dollars. Yet one may be

enabling statute terminated the MHC in August 2002.[155]

III. FISCAL ZONING THROUGH THE AREA VARIANCE: LOCAL GOVERNMENTS' UNREGULATED DISCRETION TO GRANT EXCEPTIONS TO ZONING NORMS

A variance is an exception to general zoning regulations that only the local zoning authority can grant to a property owner.[156] There are two types of variances: the use variance, which allows a property owner to use his property in a way that would violate zoning regulations,[157] and the area variance, which allows a property owner to build a structure whose size or dimensions would violate zoning regulations.[158] Variances are a practical acknowledgement that a zoning ordinance can not provide for unforeseen circumstances and that there needs to be some degree of flexibility on a case-by-case basis.[159] Variances have traditionally operated as a "safety-valve"[160] to avoid unconstitutional regulatory takings of private property.[161]

The legal requirements for granting an area zoning variance are determined by each state.[162] States generally require that some or all of the following conditions apply:[163] strictly enforcing the ordinance would

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> forgiven for having forgotten the report, given . . . the resounding silence from Capitol Hill in response to the report. . . . Unfortunately, both Congress and the Department of Housing and Urban Development . . . have been quietly hoping the report will disappear, which it all but has . . . .

Id.

155. Act of Oct. 20, 1999, Pub. L. No. 106-74, § 206(g), 113 Stat. 1047, 1072 (codified as amended at 42 U.S.C. § 12701 note (2000) (Millennial Housing Commission)).

156. *See* COON & DAMSKY, *supra* note 46, at 93-96 (defining the variance).

157. *Id.* at 94.

158. *Id.*

159. *See, e.g.*, David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 282-84 (2004) (tracing the history of the variance concept back to the New York City Building Code in 1862 and describing the practical necessity of variances for unusual and unanticipated situations).

160. *See id.* at 283 & n.8 (explaining the "safety-valve" analogy and providing examples of cases that have used it).

161. *See id.* at 288-89 & 289 n.29 ("A land use regulation that deprives the owner of all economically beneficial or productive use is, with limited exceptions, an unconstitutional taking."). The Fifth Amendment prohibits uncompensated takings. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

162. *See* Owens, *supra* note 159, at 284 ("[T]he precise formulation used by the states, along with the judicial interpretation that has been applied, varies.").

163. *See, e.g., id.* All states have modeled their law on variances after the Standard State Zoning Enabling Act, *see* DANIEL R. MANDELKER, LAND USE LAW § 4.15, at 4-12 (2003), which allows the local zoning authority

impose unnecessary hardship or practical difficulties on the landowner;[164] the exception would protect, or is consistent with, public welfare;[165] the exception is consistent with the intent of the ordinance;[166] granting the variance is in the interest of justice;[167] the exception will not threaten the character of the neighborhood;[168] and granting the variance does not threaten the rights of others.[169]

Though these statutory requirements for granting variances are vaguely worded,[170] when variances are challenged through litigation courts have traditionally interpreted the requirements strictly.[171] Courts maintain that the power to grant variances should be "'sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature, and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others.'"[172] According to one expert,[173] the judicial test for what constitutes an unnecessary hardship or practical difficulty is so stringent that "it is the rare variance request that meets such a . . . test . . . and the fact that [absent litigation] variances are routinely approved without meeting it has long been a principal judicial and academic criticism of variance practice."[174] Some

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> "[t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

Id. § 6.41, at 6-45 (quoting STANDARD STATE ZONING ENABLING ACT § 7 (1924)).

164. *See* C. R. McCorkle, Annotation, *Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto*, 168 A.L.R. 13, 23 (1947).

165. *See id.* at 24.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Owens, *supra* note 159, at 285. Professor Owens points to Frank E. Horack, Jr. and William M. Maltbie as prominent legal minds who have criticized the vague standards for zoning variances. *Id.* at 285 n.20, 286 n.21. Maltbie stated that the unnecessary hardship and practical difficulties standards "almost defy critical analysis." William M. Maltbie, *The Legal Background of Zoning*, 22 CONN. B.J. 2, 6-7 (1948).

171. *See* Owens, *supra* note 159, at 287-88.

172. *Id.* (quoting Hammond v. Bd. of Appeal, 54 N.E. 82, 83 (Mass. 1926)).

173. Professor Owens is a Professor of Public Law and Government at the University of North Carolina at Chapel Hill. *Id.* at 279, n.*.

174. *Id.* at 289; *see also* Nancy Perkins Spyke, *What's Land Got To Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 405-06 (2004) (arguing that the standard for what constitutes an unnecessary hardship or practical difficulty is often more lenient for area variances than for use variances). Professor Spyke further explains that:

courts have distinguished between the use variance and the area variance, and have interpreted the requirements for an area variance more broadly.[175] Even though state zoning laws treat both kinds of variances identically,[176] these courts have justified relaxing the requirements for area variances by claiming that an area variance poses less of a threat to both the surrounding property owners and planning efforts than does a use variance.[177]

Improperly granting area variances is problematic for workforce housing affordability.[178] In practice, "[w]hile the courts consistently characterized the variance as a narrow tool for relief in extraordinary situations, the variance . . . has been widely used as a device for much broader zoning flexibility."[179] The effect of such "abuse of the variance power [is to] undermin[e] the effectiveness of planning and responsible land use regulation,"[180] including the planning and regulation that promotes affordable workforce housing.[181] Moreover, area variances are

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> [t]he relaxation of the unnecessary hardship test in non-use variance situations suggests that the private property rights of landowners are given greater weight when matters such as area, height, and setbacks are concerned, while the aims of local planners diminish in importance.
>
> It is not uncommon . . . for zoning ordinances to impose a more lenient standard of hardship when a non-use variance is sought.

Id. at 406.

175. *See* Owens, *supra* note 159, at 289 & n.31.

176. *Id.* at 290.

177. *Id.*; *see also* Osborne M. Reynolds, Jr., *The "Unique Circumstances" Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127, 129-30 (1999).

178. *Cf. The Money Gang: Fighting Monster Homes* (CNNfn television broadcast Aug. 20, 2004), 2004 WL 83698470 [hereinafter *Fighting Monster Homes*] (pointing out that mansionization eliminates starter homes).

179. Owens, *supra* note 159, at 295. Studies of variance practice have shown an approval rate of over fifty percent after 1925, over seventy percent after 1945, and nearly eighty percent after 1960 until 1990, and this has caused "[a]cademics and land use lawyers . . . to view the variance with alarm." *Id.* at 295-96. Owens details several "[p]rominent critiques" of the local misuse of the variance: Richard Babcock, who found variance decisions in practice were "unprincipled and undisciplined," and generally a "'debacle,'" *id.* at 297; Robert Anderson, who concluded that "variance decisions were erratic, unpredictable, and not based on judicially established standards," *id.*; Jesse Dukeminer and Clyde Stapelton, who found variance decisions were being made "with little regard for the rule of law, were inconsistent[,] . . . usurped legislative functions, and rendered portions of the zoning ordinance ineffective," *id.*; and Ronald Shapiro, who lamented the "the 'shocking [sic] disparity between the theory of the variance power and its practical application' with a resultant 'flood of illegal variations which challenge the protective aims of zoning,'" *id.* (quoting Ronald M. Shapiro, *The Zoning Variance Power — Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 3 (1969)).

180. *Id.* at 297.

181. *Id.* at 280. In fact,

the most commonly requested variances,[182] and are frequently granted.[183] They allow residential property owners to deviate from maximum height and dimension requirements to increase the size and value of their homes.[184]

IV. THE ADEQUACY OF THE VARIOUS LEGAL APPROACHES TO THE WORKFORCE HOUSING SHORTAGE AND HOW IT IS UNDERMINED BY IMPROPER GRANTS OF AREA VARIANCES

A. Developing Affordable Housing: Proactive Versus Reactive Legal Approaches

Legal approaches to the workforce housing problem can be divided into two main categories: proactive strategies to promote the development of affordable housing, and reactive strategies where developers of affordable housing are unable to obtain permits based on zoning rules.[185] The *Mount Laurel* approach[186] and state override statutes or appeals statutes[187] are examples of reactive solutions to affordable housing.[188] They operate as fall-back options for developers who want to build affordable housing but can not get permission because the zoning

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> [l]and use professionals have held an uneasy suspicion that much of the careful balancing of public and private interests accomplished in plan making and ordinance adoption is surreptitiously negated by undisciplined variance administration. A conventional wisdom has developed that the zoning variance is widely abused—that it is used to quietly grant special favors to the politically connected, that uneducated lay boards apply their peculiar notion of justice rather than judiciously applying narrowly defined legal standards, or that these unelected boards substitute their own judgment as to what the zoning ordinance should be rather than faithfully applying the regulations adopted by elected officials. Both variance petitioners and neighbors have decried arbitrary decision-making procedures in the variance process . . . .

Id. at 280-81. Such abuse directly undercuts efforts to achieve workforce housing affordability.

182. *See id.* at 310 ("By far the most common variance requested is from regulations establishing setbacks for principal structures.").

183. *See id.* at 309 (reporting that a recent study of variance practice in North Carolina revealed a seventy-two percent approval rate).

184. *See* COON & DAMSKY, *supra* note 46, at 94-96. Such deviations can impact the value of surrounding lots as well. *Cf. Fighting Monster Homes*, *supra* note 178.

185. *See* Brown, *supra* note 7, at 600-01 (identifying types of "existing [state] solutions").

186. *See* discussion *supra* Part I.B.2.(a).

187. *See* discussion *supra* Part I.B.2.(b).

188. *See* Brown, *supra* note 7, at 615 (describing the provisions of the Massachusetts Low and Moderate Income Housing Act which permits a developer to appeal local zoning board decisions). The Massachusetts law was the model for similar statutes enacted in Connecticut and Rhode Island. *Id.* at 613.

regulations prohibit or exclude that type of development.[189] These approaches, although necessary to ensure that the permit-denial is not arbitrary or exclusionary, depend on developers' initiative to construct affordable housing for any possible success in promoting affordable housing.[190] If there is no developer who wants to build affordable housing, these fall-back options are never exercised, and their positive influence on affordable housing is never realized.[191] They are effective in dealing with a present affordable housing crunch; that is, where there is an immediate need for affordable housing and an immediate proposed solution.[192] However they can be defeated by communities that are willing to "engag[e] in a legal war of attrition [through litigation] until it no longer [makes] sense for the developer to proceed."[193]

Conversely, proactive efforts, such as comprehensive planning statutes,[194] mandatory set-asides,[195] and HTFs,[196] are inclusionary measures that attempt to provide for future affordable housing needs.[197] Although the actual success of mandatory set-asides and HTFs is tangible,[198] it is limited.[199] Inclusionary zoning ordinances that require mandatory set-asides, such as the MPDU in Montgomery County, Maryland,[200] have provided some affordable housing, but the affordability of such housing has often been lost.[201] Originally, the MPDU only protected the affordability of the units it created for a period of ten years, after which time they could be sold at fair market

189. *See id.* at 615.

190. *See* Goetz et al., *supra* note 83, at 35-36, 35 n.21, 36 n.31.

191. *See id.* at 36.

192. *Cf.* Brown, *supra* note 7, at 613-15 (describing the Massachusetts appeals statute that applies only when developers seek permits to build affordable housing, but are denied).

193. *Id.* at 620.

194. *See* discussion *supra* Part I.B.2.(b).

195. *See* discussion *supra* Part I.B.2.(c).

196. *See* discussion *supra* Part I.B.2.(c).

197. *See* Brown, *supra* note 7, at 624-25 (contrasting this approach, which he categorizes as a "carrot," from the reactive builder's remedy, which he categorizes as a "stick"); Larsen, *supra* note 114, at 525 (classifying the HTF approach as "incentive-based").

198. *See* Brown, *supra* note 7, at 633 (noting that "[b]etween 1974 and 1997, 10,110 affordable units were created, including 7,305 units for sale and 2,805 units for rental" because of the MPDU).

199. *Cf.* Parr, *supra* note 110, at 329 n.65 ("Most state and local funds are targeted at populations earning no more than 80% of area median income.").

200. *See, e.g.*, MONTGOMERY COUNTY, MD., CODE § 25A-5(a) to (b) (2004), http://www.amlegal.com/library/md/montgomeryco.shtml (follow "Frames" hyperlink; then follow "Part II. Local Laws, Ordinances, Resolutions, Etc." hyperlink; then follow "Chapter 25A. Housing, Moderately Priced" hyperlink).

201. *See* Barker, *supra* note 7.

value.[202] Meanwhile, the MPDU only facilitates the development of new affordable workforce housing units, and the county is running out of land for such projects.[203] Similarly, HTFs have helped people find housing they can afford,[204] but they only help a small number of people with the greatest need.[205] Assistance under the HTF approach is properly reserved for low-income residents, and even then, there is not enough money to help them all.[206] Their effect on the larger housing affordability problem is minimal.[207]

Comprehensive planning statutes are sensible in theory, but tend to use vague language rather than concrete requirements, and have had limited success.[208] They are merely a statutory acknowledgement of the fair-share doctrine, often without specific guidelines.[209] For example, the Oregon planning statute requires local governments to "encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households."[210] It imposes no specific fair-share requirements, nor does it provide incentives for developers to build workforce housing.[211] Although forward-thinking is an important aspect of ensuring sustainable communities, requiring mere consistency with a vague goal demands little and is essentially ineffective in practice.[212]

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202. *Id.* The City County Council for Montgomery County extended this time period in 2004. Act of Nov. 30, 2004, No. 24-04/25-04/27-03, § 1 (County Council for Montgomery County, Md. 2004), [website] http://www.montgomerycountymd.gov/content/council/2004bills/25-04.pdf (amending § 25A-3(g) by extending the county's price control to thirty years for purchased units and ninety-nine years for rental units).

203. Barker, *supra* note 7.

204. *See* Brooks, *supra* note 108, at 61-62 (discussing "[s]ucess [s]tories"); Parr, *supra* note 110, at 330.

205. *See* Brooks, *supra* note 108, at 56.

206. *See id.*

207. *Cf.* Larsen, *supra* note 114, at 535 (describing the HTF approach's potential as "an essential tool for realizing the state's affordable housing needs" that have not yet been realized).

208. Brown, *supra* note 7, at 627, 632.

209. *See* Goetz et al., *supra* note 83, at 38-39.

210. OR. DEP'T OF LAND CONSERVATION & DEV., OAR 660-015-0000(10), OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 10: HOUSING 1, http://www.lcd.state.or.us/LCD/docs/goals/goal10.pdf (last visited Dec. 19, 2005).

211. *See* Brown, *supra* note 7, at 628.

212. *See, e.g.*, Goetz et al., *supra* note 83, at 38-39; Iglesias, *supra* note 16, at 454. Furthermore, in spite of the Oregon statute, Portland has become "one of the most expensive places in the country to live." John McIlwain, *Housing Affordability: Can Smart Growth Principles Help To Provide for Sufficient Affordable Workforce Housing in Urban Areas?*, URB. LAND, Jan. 2002 at 46-47. Some even suggest that Portland's approach has actually resulted in a shortage of affordable housing, though there is no consensus on the merits of this suggestion. *See id.* at 47-49. The problem in Portland, like many rapidly

A combination of both reactive and proactive approaches is a more effective means of promoting affordable housing.[213] Although proactive approaches anticipate the future need for workforce housing, the reactive approaches described above focus on the immediate need for workforce housing.[214] Neither approach is sufficient alone, but combined they address most aspects of the affordable workforce housing problem.[215] Municipalities adopting these approaches should continually reevaluate the programs to ensure ongoing effectiveness.[216]

B. Can Local Governments Be Trusted To Consider Their Fair Share? The Tension Between Localism and Regionalism

The state's regional interests in providing housing for its economically diverse population are often at odds with local governments' interests in developing their own communities.[217] Courts and state legislatures have begun to take over land-use decision making in order to eliminate exclusionary zoning, NIMBY tendencies, and the failure of local governments to consider their fair share of the larger regional housing needs.[218] This trend, known as "regionalism,"[219] puts the state's regional interest in an adequate supply of workforce and low-income housing first.[220] Regionalism tends to deprive local governments of their traditional broad discretion over land use, known as "localism,"[221] using the various proactive and reactive approaches discussed above.[222] Because states and courts increasingly impose inclusionary measures, local zoning authorities no longer have unfettered discretion over their

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growing cities, is the result of failure by "planners to anticipate the rate at which Portland's population would grow." *Id.* at 48. Comprehensive planning thus relies on future planning, which is inherently uncertain. *Id.*

213. *See* Calavita et al., *supra* note 71, at 138 (concluding that the effect of the two types of inclusionary approaches, alone, is limited but that "[a]ny truly serious effort to address the needs of lower-income populations must call upon *a more comprehensive range of tools and remedies*"(emphasis added)).

214. *See infra* notes 194-97 and accompanying text.

215. *See* Calavita et al., *supra* note 71, at 138.

216. Montgomery County, Maryland, for example, amended its MPDU program in 2004. *See supra* note 202.

217. *See* Brown, *supra* note 7, at 601; *cf.* Iglesias, *supra* note 16, at 451.

218. *See, e.g.*, *Mount Laurel I*, 336 A.2d 713, 724 (N.J. 1975), *rev'd*, 456 A.2d 390 (N.J. 1983); *see also supra* Part I.B.2.(b) (discussing regional regulatory measures implemented in various states).

219. *See, e.g.*, Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 144-49 (2004).

220. *See id.* at 144.

221. *See* Iglesias, *supra* note 16, at 455.

222. *See supra* Part IV.A.

land-use decision making.[223] More often local entities must answer to the state or the court system when they are not careful to consider fair-share principles.[224]

State and judicial encroachment on local authority is justified, despite evidence that local communities can undertake such efforts themselves by establishing a local HTF or their own inclusionary ordinances.[225] Because regionalism only interferes with localism where local authorities fail to provide housing for residents of all economic levels, it is not inconsistent with these local initiatives.[226] Accordingly, regionalism is an essential component to a workforce housing strategy.[227]

Some proposed inclusionary approaches are mindful of both regionalism and localism.[228] These programs appear to be the most promising alternatives amidst a growing consensus that it is important for local governments to have some autonomy over decisions directly affecting their communities.[229] Recognizing that state and local governments have a common interest in land use, these proposed strategies attempt to strike a balance between the state's desire for uniformity and the locality's interest in autonomy.[230] Two examples of such hybrid approaches are the "housing impact assessment" (HIA) regime[231] and the "regional housing legislature" (RHL) approach.[232]

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223. *See* Brown, *supra* note 7, at 603 (lamenting that because of this decreased local control, such inclusionary measures are "failures").

224. *See* discussion *supra* notes 62-63, 82-84 and accompanying text.

225. *But cf.* Brown, *supra* note 7, at 633-34 (concluding that the reason for Montgomery County's success is that it has no municipalities, and arguing that "local governments inhibit the construction of affordable housing").

226. *See id.* at 634 (pointing out that it is not necessary for "an all-powerful regional government [to] displace all local control" and arguing that a body that represents "the will of the region's inhabitants as a whole. . . . can operate in concert with local governments, rather than replacing them")

227. *See* Brown, *supra* note 7, at 633-34 (referencing a MPDU enthusiast who claims that a "'highly fragmented metro area has little ability to agree on socially controversial policies, absent powerful compulsion by state or federal law'" (quoting DAVID RUSK, CITIES WITHOUT SUBURBS 86 (1993))); Larsen, *supra* note 114, at 529.

228. *See, e.g.*, Brown, *supra* note 7, at 648; Iglesias, *supra* note 16, at 512.

229. Brown, *supra* note 7, at 648.

230. *See, e.g.*, Iglesias, *supra* note 16, at 458 (noting that regionalism is an unlikely goal and solutions must respect traditions of localism).

231. *Id.* at 475-83.

232. *See* Brown, *supra* note 7, at 648-59.

The HIA regime is a proposed state regulatory approach.[233] This system would allow local governments to retain authority over land-use while forcing them to "serve the states' housing goals."[234] It would require local governments, which tend to ignore housing issues, to take them into consideration when implementing zoning regulations[235] by making an initial assessment of whether a zoning decision may adversely impact "the supply, affordability or availability of housing."[236] Where the local government finds in the affirmative, more detailed state review and, if necessary, public hearings would follow.[237] These procedures would require a legitimate and extensive inquiry, in which the local government would participate, that adheres to carefully crafted standards to carry out the comprehensive plan for the region.[238]

The RHL approach is another proposed solution to the shortage of affordable workforce housing.[239] It would "combine[] the successful elements of the existing [state regulatory approaches] . . . with respect for local autonomy."[240] The RHL itself is a "democratically elected body composed of representatives from each of the region's localities, charged with establishing a coherent regional affordable housing policy."[241] The RHL would take over the roles of making regional housing policy, supervising local communities to ensure they act in accordance with such policy, and would act "as the tribunal to enforce its own mandates."[242]

Both of these strategies promote cooperation between the state and local authorities, but do not return to the broad permissive principles articulated in *Euclid*.[243] These efforts acknowledge that increased

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233. *See* Iglesias, *supra* note 16, at 438 (advocating this approach as a promising solution to the present affordable housing crisis). This system is modeled after the "environmental impact statement," a successful federal initiative in the 1970s that has forced local governments to take the environmental impact of their land-use decisions into consideration, "help[ing] turn around America's environmental policies." *Id.* at 434-35.

234. *Id.* at 459.

235. *Id.* at 461-63.

236. *Id.* at 477-78 (proposing this strategy to deal not only with variances, but also with all government decisions that affect housing).

237. *See id.* at 480-81 (describing the HIA procedure as a cumulative effort by the state and local government to ensure the proposed development does not threaten affordable housing).

238. *See id.*

239. *See* Brown, *supra* note 7, at 599.

240. *Id.* at 648.

241. *Id.* at 599. Brown also argues that the RHC will provide "democratic legitimacy . . . by giving each locality a meaningful voice in the development of regional affordable housing policy" and will therefore avoid the "contentiousness of existing affordable housing solutions." *Id.*

242. *Id.* at 648.

243. *See id.* at 661; Iglesias, *supra* note 16, at 514.

regional controls over local authority can be more helpful than harmful in providing more affordable housing for citizens of diverse economic backgrounds.[244]

C. The Battle Against NIMBY Has Overlooked a Practice That Has the Same Exclusionary Effect—Mansionization

Despite the trend toward more judicial and legislative control over local zoning requirements,[245] local authority to grant exceptions to zoning requirements remains broad.[246] The various affordable housing strategies described have focused almost exclusively on new development proposals that aim to increase the supply of affordable workforce housing.[247] Because current projections indicate that demand for affordable housing will continue to increase, this focus is well-placed.[248] However, affordable housing strategies should consider the causes of the increase in home prices.[249]

The local zoning authority's unfettered discretion to grant area variances is having a disparate effect on efforts to promote affordable workforce housing.[250] Improper grants of area variances contribute to the growing problem of "mansionization," a "trend—now rampant in the

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244. *See* Brown, *supra* note 7, at 661; Iglesias, *supra* note 16, at 515.

245. *See supra* note 218 and accompanying text.

246. *See* Owens, *supra* note 159, at 295 ("[T]he variance in practice has been widely used as a device for much broader zoning flexibility.").

247. *See* Delaney, *supra* note 45, at 170-76 (describing recent policies that would limit the construction of new affordable workforce housing in various states, and the debates surrounding such policies).

248. *See, e.g.*, McIlwain, *supra* note 4, at 30-31 (describing the increasing number of workforce families with critical housing needs).

249. *See id.* at 31; *The Sun Also Sets*, *supra* note 17, at 67 (arguing that property values are presently severely overinflated: "since the mid-1990s prices have increased more than twice as much . . . as in the 1970s or 1980s"). Critics argue that the United States fails to recognize the distorted housing market by maintaining that "a national housing bubble is highly unlikely because prices are determined largely by local factors" in spite of the fact that a study of the housing market concluded that "home prices look overvalued in 20 states that account for over half America's population." *Id.* at 68.

250. *See* Owens, *supra* note 159, at 315. Individually, such exceptions to zoning requirements seem insignificant. *Id.* ("[R]elatively modest adjustments to setback requirements . . . [are] hardly likely to shake the foundations upon which the ordinances are based."). However, their collective impact undermines the success achieved by other affordable housing schemes by providing developers with a means to mansionize neighborhoods. *See* Annie Gowen, *A Large-Scale Disagreement: As Massive Houses Prompt Protests, Arlington Proposes Limits*, WASH. POST, Mar. 31, 2005, at A1 (describing proposed changes to zoning regulations that attempt to preclude suburban mansionization); *Fighting Monster Homes*, *supra* note 178 (linking mansionization with decreased availability of more affordable starter homes). Proposed changes to zoning regulations would be ineffective given the current procedures for granting area variances. *See supra* notes 178-84 and accompanying text.

close-in suburbs—of tearing down older homes and building million-dollar edifices in their place, often squeezed onto tiny lots."[251] Mansionization will often require a deviation from the minimum set-back requirements or height requirements established by zoning regulations.[252] The cumulative significance of improperly granting individual exceptions to zoning regulations that permit mansionization is considerable because it could unsystematically and permanently alter the character of a mixed-income community.[253] First, demolishing an existing small or moderately sized home eliminates it altogether from the market. Second, first-time home owners are unable to afford its replacement[254]—a giant-sized, expensive home, commonly referred to as a "McMansion" or "Monster Home."[255] Third, once mansionization catches on, developers with deep pockets can drive up the values of the surrounding properties, pricing workforce families and first-time homeowners out of the neighborhood completely.[256] Moreover, opportunity and incentive to challenge area variances are minimal for those who are most adversely affected by these decisions.[257] This is because they either lack legal resources and knowledge,[258] or, in the case of future residents, because they are simply not in a position to challenge the decisions.[259] Therefore, courts never review most variance grants.[260]

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251. Gowen, *supra* note 26.

252. *See id.* (reporting that proposals that would restrict this practice in order to specifically target mansionization are receiving more attention); Gowen, *supra* note 250 (discussing proposals to amend zoning regulations in order to reduce height and set-back requirements in Arlington, Virginia). Such proposals would likely encourage developers to apply for variances to carry out their prerogative of mansionizing their property despite the zoning restrictions. *Cf. supra* notes 178-84 and accompanying text.

253. *Cf.* Owens, *supra* note 159, at 295-99.

254. *Fighting Monster Homes*, *supra* note 178.

255. Gowen, *supra* note 26; *see also Fighting Monster Homes*, *supra* note 178 (reporting that "[h]ome sizes have swelled 40 percent since the early '70s").

256. *See Fighting Monster Homes*, *supra* note 178; see also The Kojo Nnamdi Show: Zoning, Development & Supersized Homes (WAMU 88.5FM radio broadcast Aug. 15, 2005), *available at* http://www.wamu.org/programs/kn/05/08/15.php [hereinafter *Supersized Homes*].

257. *See* Reynolds, *supra* note 177, at 139-40 (suggesting that the lack of judicial review of most variance grants may be the reason for the inconsistency between "theory and practice in this area of the law").

258. *Id.* at 139.

259. *See* Iglesias, *supra* note 16, at 461; *see also* Warth v. Seldin, 422 U.S. 490, 504, 508 (1975) (discussing standing requirements for third parties in zoning actions).

260. *See* Owens, *supra* note 159, at 316 (noting that "[m]ost variance decisions are not appealed [in] court," but when they are, "the most common result is that the board's decision is affirmed" and citing a recent study of variances that found only two and one-half percent of variance denials were appealed in court).

The abuse of the zoning variance has long been considered a weakness of zoning.[261] It is especially troublesome where it undermines precisely what current planning efforts are designed to solve.[262] Demolishing and rebuilding a residential unit has traditionally been within the right to reasonably use one's property.[263] It can even increase surrounding property values, resulting in a windfall benefit to the other owners.[264] Courts have impliedly acknowledged both of these propositions by relaxing the requirements for granting area variances that permit mansionization.[265] Among the many complaints about mansionization, neighbors claim that the new McMansions are an eyesore and "built right to the lot line," infringing on privacy.[266] But, more significantly, given the present affordable housing shortage,[267] replacing a modest starter home with one that is unaffordable to the vast majority, and thereby increasing the surrounding property values, prices workforce families and first-time homeowners out of the neighborhood.[268] Thus, mansionization, through the abuse of the area variance, undermines inclusionary efforts.[269]

V. AFFORDABLE HOUSING STRATEGIES SHOULD RESTRICT LOCAL DISCRETION OVER GRANTING AREA VARIANCES

Given that area variances are the most commonly requested variances,[270] the ease with which they are granted,[271] and the lack of state or judicial control over the zoning authorities that grant them,[272] controlling area variances should play a more significant role in affordable housing strategy. Fair share principles should apply when an exception to a zoning regulation is requested, just as they do when zoning

261. *See id.* 280-81 (quoting Judge Benjamin Cardozo: "[t]here has been confided to the [zoning] board a delicate jurisdiction and one easily abused. Upon a showing of unnecessary hardship, general rules are suspended for the benefit of individual owners and special privileges established.").

262. *See id.*

263. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (recognizing the right to build on one's own land); *Supersized Homes*, *supra* note 256.

264. *See Fighting Monster Homes*, *supra* note 178.

265. *See supra* text accompanying notes 175-77.

266. *Fighting Monster Homes*, *supra* note 178; *see also Supersized Homes*, *supra* note 256.

267. *See* discussion *supra* notes 1-13, 250 and accompanying text.

268. *See Fighting Monster Homes*, *supra* note 178.

269. *Cf.* Owens, *supra* note 159, at 319.

270. *See id.* at 310.

271. *See id.* at 303, 309.

272. *See* discussion *supra* Part IV.C.

regulations are merely being enforced or challenged.[273] Like a new development proposal or a zoning regulation, a proposed variance may dramatically affect existing residential property values, especially in the case of a mansionization proposal.[274] Imposing additional substantive and procedural requirements[275] for obtaining an area variance would ensure that mansionization does not undermine affordable workforce housing efforts.[276] Ideally, such additional requirements should simultaneously encourage fair share principles and new investment into the community.[277]

A determination of what additional requirements are appropriate, should borrow from the strategies that have had the most success in providing affordable workforce housing,[278] and from those proposed strategies that show the most promise.[279] States and localities have implemented suggestions that successfully incorporate fair-share principles into large-scale new development.[280] They should extend proactive and reactive strategies, as well as the proposals for hybrid approaches that balance regionalism with localism, to the house-by-house redevelopment of existing neighborhoods.[281] Any request for an area variance should trigger a careful analysis of the economic exclusionary impact of the proposed variance, and a consideration of the housing needs of both the community and the region.[282]

According to courts that have presided over variance grants, local authorities should, as a matter of course, strictly limit an owner's ability

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273. *See* Owens, *supra* note 159, at 319 ("[A]ll individual petitions [for variances] should incorporate consideration of the impacts of the [proposal] on community interests.").

274. *See, e.g.*, *Supersized Homes*, *supra* note 256 (partly attributing rapidly rising property values to the high price can, and will, pay for lots on which they can build monster homes with high resale values).

275. *See, e.g.*, News Release, Howard Denis, Councilmember, Montgomery County, Md., Council, Denis Statement on his Legislation to Address "Mansionization" In County, (Nov. 26, 2003), http://www.montgomerycountymd.gov/content/council/2003news/1126hdmansion.pdf (arguing for additional requirements and specificity before allowing exceptions to height requirements).

276. *Cf.* Gowen, *supra* note 250 (reporting proposed changes to existing zoning requirements). Merely imposing new zoning requirements, such as floor to area ratios (FAR), would not suffice without an amendment to the variance procedure because obtaining variances from the new regulations would be just as easy as obtaining them from existing regulations. *See* discussion *supra* Part III.

277. *Cf. Fighting Monster Homes*, *supra* note 178.

278. *See* discussion *supra* Part IV.A.

279. *See supra* notes 229, 231-32 and accompanying text.

280. *See* discussion *supra* Parts IV.A-.B.

281. *See* discussion *supra* Parts IV.A-.B (describing these strategies and proposals).

282. *See* Iglesias, *supra* note 16, at 478-79; Owens, *supra* note 159, at 319.

to deviate from zoning regulations.[283] In theory, zoning regulations—which are a proper exercise of police power—either already restrict a property-owner's right to build up his tract, or will soon restrict that right as mansionization attracts more attention and as communities pass stricter zoning laws.[284] Incorporating fair share principles into the variance process would place no further limit on an owner's legal right to build up his property. Rather, where he is already prevented by law from doing so, using the fair-share doctrine as a factor in determining whether he deserves a variance would simply help limit the use of variances to the rare circumstances for which they were intended—when depriving an owner of variance would amount to a regulatory taking.[285]

VI. CONCLUSION

Local variance procedure should incorporate both the trend toward state and judicial scrutiny of local zoning decisions, and the trend toward a more active state role in directing local governments' zoning policies while respecting localism. The collective impact of improperly granting area variances, where the decisions are made solely based on fiscal considerations without regard to fair share principles, is to overinflate property values, price workforce families out of communities, and undermine the nationwide legal trend toward inclusionary practices. A property owner's request for an area variance should trigger additional procedural and substantive requirements. Such requirements should implement strategies that have successfully provided affordable workforce housing around the nation, as well as proposed strategies that show promise. Without extending the fair-share doctrine to variance procedure, mansionization of inner suburbs will continue to exclude workforce families from the communities in which they work.

283. *See supra* notes 171-74 and accompanying text.

284. *See* Gowen, *supra* note 250; *supra* notes 28-29 and accompanying text.

285. *See supra* note 161 and accompanying text.